IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 9203 OF 2004

Armaity Jimmy Sukhia ...Petitioner

Versus

Bacha Paul Kitchner @
Bacha Rustom Kitchner and Ors. ...Respondents

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Mr. M.P. Sanghavi with Ms. M.S. Shroff i/b M/s. Gagrat and Co. counsel for Petitioner
Mr. V.C. Ghosalkar, counsel for Respondent No.1.
Mr. A.B. Avhad, counsel for respondent No.5.

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CORAM: B. H. MARLAPALLE, J.
DATED: 17TH MARCH, 2005

P. C.:-

1. Heard Mr. Sanghavi with Ms. Shroff i/b M/s. Gagrat and company for the petitioner and Mr. Ghosalkar, the learned counsel for respondent No.1 and Mr. Avhad, the learned counsel for respondent No.5. Leave to delete respondent Nos. 2, 3, 4 and 6 including their L.Rs., if any.

2. Rule. The respondents waive service. Rule is taken up for final hearing forthwith.

3. On or about 4.10.2002, the present respondent No.1 has filed Special Civil Suit No.716 of 2002 alongwith an application for temporary injunction before the learned Joint Civil Judge, Senior Division and Small Causes Court at Pune. The present petitioner is impleaded as defendant No.1 in the said

suit and she had caused her appearance by filing an affidavit in reply to the application at Exh.5 on 12.11.2002. The application for temporary injunction was dismissed after hearing the parties concerned on 9.2.2004 and this order came to be challenged in Appeal from Order No.339 of 2004. This appeal was rejected on 13.4.2004 but the defendant No.5 was directed to deposit an amount of Rs.50,00,000/- with the registry of this Court pending the hearing and final disposal of the suit. The amount has been deposited. In the meanwhile, on 25.2.2004 the trial court passed an order of no written statement and on 19.3.2004 an application at Exh.84 came to be filed by the petitioner-defendant No.1 to set aside the no written statement order. This application has been rejected by the order dated 2.8.2004 and hence, this petition under article 227 of the Constitution of India.

4. The trial court held that the reasons set out by the defendant No.1 in the application at Exh.84 did not make out an exceptional case for exercising the discretion as available under Rule 9 and 10 of Order VIII of C.P.C. and by referring to the decision of this Court in the case of **Shailaja A. Sawant V/s. Sayajirao Ganpatrao Patil [2004 (2) Mh.L.J. 419],** the application was rejected.

5. The learned counsel for the petitioner submitted that the Special Civil Suit has been filed claiming partition of the family property situated at Pune and the parties are interse sisters. The defendant No.1 is unaware of the court procedures and the limitation of 90 days for filing written statement, she went by the advocate's actions and when she realised that an order of no written statement was passed on 25.2.2004, an application to set aside the same was placed before the court on 19.3.2004 but without setting out the proper reasons to make out a case for exercising the discretionary powers. A cryptic reason of inadvertence was set out in the said application and drafted in Marathi and obviously by the advocate's clerk. The intention of law can never be to punish the litigants on account of the shortcomings of the advocates they engaged, urged the learned counsel.

6. On the other hand, the learned counsel for the respondent no.1 strongly supported the impugned order and the reasonings set out therein by referring to the decisions of this Court in the case of Shailaja Sawant (supra) as well as **Chintaman Sukhdeo Kaklij and Ors. Vs. Shivaji Bhausaheb Gadhe and Ors. [2004 (4) Mh.L.J. 739].**

7. There is no dispute that the parties to the suit

are sisters, reply to the application at Exh.5 was filed and it was contested. On failure of the said application parties approached this Court in an Appeal from Order and the present petitioner had contested the said appeal. The plaintiff was allowed to carry out an amendment to the plaint on 2.4.2004 even after no written statement order was passed on 25.2.2004. These obtaining circumstances indicate that the defendant No.1 was not negligent or careless in contesting the suit. She has come out with a case in the instant petition that she was totally unaware of the limit of 90 days in the amended provisions of Order VIII Rule 1 of C.P.C. and in good faith she went by the steps taken by the advocate she had engaged. When it was brought to her attention that the court had passed no written statement order on 25.2.2004, she came to know for the first time that the written statement on her behalf was not filed within the prescribed time limit. The claim between the parties could be more efficaciously adjudicated and may be to give finality to the dispute between the parties (family members) the discretion could be appropriately exercised so as to allow the petitioner to file her written statement and that too at the earliest possible. The Division Bench of this Court in the case of Chintaman Kaklij (supra) held that Rules 9 and 10 of Order VIII of C.P.C. give discretion to the trial court to allow the defendant

to file written statement even after the expiry of the period of 90 days as contemplated by order VIII Rule 1. However, the court further added a note of caution that the order of extending time to file written statement cannot be granted casually and unmindful of these provisions the extension would not exceed 90 days and ordinarily such extension should not be granted except in exceptional and special circumstances. The case in hand is the case of special circumstances and therefore, I am inclined to allow this petition but by imposing exemplary costs.

8. Hence, the petition succeeds. The impugned order dated 2.8.2004 passed below Exh.84 is hereby quashed and set aside on the condition of payment of costs quantified at Rs.20,000/- (Rupees Twenty thousand only) which shall be remitted to the State Legal Services Authority of this Court within a period of two weeks and that the written statement shall be presented to the Court below within this period of two weeks which the proof of remittance of cost amount.

9. Rule made absolute accordingly.

10. Mr. Ghosalkar, the learned counsel for the respondent No.1 at this stage made an oral application for staying this order. The application

is hereby rejected.